IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No. 322

ROSCOE HERGET, TRUSTEE IN BANKRUPTCY OF N. L. ROGERS & COMPANY, INC., AN ILLINOIS CORPORATION, BANKRUPT,

Petitioner,

vs.

THE CENTRAL NATIONAL BANK & TRUST COMPANY OF PEORIA, A NATIONAL BANKING CORPORATION.

REPLY BRIEF FOR PETITIONER

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PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.



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The Petition Is Plainly in Time

Respondent complains of the absence from the order extending time (R. 34) of a recital that the order was entered "for good cause shown," the statutory ground upon which the period for applying for writ of certiorari is authorized to be extended. 28 U. S. C., sec. 350.

The contention is frivolous. Examination of the records of this Court discloses that orders extending the period for applying for certiorari have for some time omitted the recital "for good cause shown." Aside from the fact that

the order is *ex parte*, it is difficult to perceive how a mere recital can add to, or its absence can detract from, the effect to be given to such an order.

No question of jurisdiction of the Justice to enter such an order is raised either as to parties or subject matter. The sole complaint is that omission of the formal recital makes the record inadequate to sustain jurisdiction of this Court to consider the petition. This overlooks the presumption of regularity which attaches to judicial orders as well as judgments. Every act of a court of competent jurisdiction, including orders as well as judgments, is presumed to have been rightly done until the contrary appears. *Voorhees* v. *Bank of United States*, 10 Pet. 449, 472. The representation of good cause made in the motion plainly conferred jurisdiction for when that was before the Justice it became his duty to determine whether or not good cause was shown; it was a subject for judicial action. *Grignon's Lessee* v. *Astor*, 2 How. 319, 339. Since there is no question as to the limited and special jurisdiction of the Justice to entertain the motion for extension of time, the same presumption of law arises that it was rightly exercised as prevails with reference to the action of a court of superior and general authority. *Comstock* v. *Crawford*, 3 Wall. 396, 403; *Simmons* v. *Saul*, 138 U. S. 439, 452. *Philadelphia and Trenton Railroad Company* v. *Stimpson*, 14 Pet. 448, 459; *Thompson* v. *Maxwell Grant Co.*, 168 U. S. 451, 463. Since respondent neither avers nor argues that good cause was not shown, the presumption that the Justice exercised his recognized power with due regard to the applicable statutory rule amply sustains the jurisdiction of this Court to consider the petition.

Respondent's Authorities Are Plainly Not in Point and Its Contentions Are All Founded on a Disregard of the Language of Section 11E.

The cogency of the authorities brought forward by respondent may be best judged by the fact that while they were all advanced in the court below, that court, although deciding for respondent, cited none of them.

1. Respondent's basic contention supports petitioner's interpretation of subsection 11e of the Chandler Act.— Respondent relies heavily on decisions prior to the passage of the Chandler Act to the effect that the time limitation set forth in subsection 11d of the Bankruptcy Act applied to causes of action created by the Bankrupty Act to the exclusion of all state laws (Resp. Br., pp. 9, 10, 11, 13). From this respondent concludes (p. 13):

> Congress by section 11e of the Chandler Act codified its concurrence that the limitation provisions contained in the Bankruptcy Act exclusively governed suits by the trustee to set aside voidable preferences * * *.

Petitioner, of course, has always recognized that the limitation provision contained in the Bankruptcy Act, section 11e, exclusively governs suits by the trustee to set aside voidable preferences. However, the provision in section 11e that the trustee may institute proceedings in behalf of the estate "within two years subsequent to the date of adjudication *or within such further period of time as the federal or state law may permit*" is a plain adoption by generic reference of the limitation provisions of the state statutes. *Interstate Railway Co.* v. *Massachusetts*, 207 U. S. 79, 85; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 391-392. The language of the state statute is thus given force by the federal law and is just as much a part of the limitation provisions contained in section 11e of the Bank-

ruptcy Act as if physically enacted in terms by the Congress. Cf. *Kendall* v. *United States*, 12 Pet. 524, 625; *Interstate Railway Co.* v. *Massachusetts*, 207 U. S. 79, 84-85. The five-year limitation period provided by the Illinois law is thus made an integral part of the second alternative clause of section 11e of the Bankruptcy Act as amended by the Chandler Act. Therefore, if full effect is given to respondent's proposition (Resp. Br., p. 13): "that the limitation provision contained in the Bankruptcy Act exclusively governed suits by the trustee to set aside voidable preferences," it follows, as petitioner contends, that the five-year period thus provided by section 11e applies.

Respondent, however, asserts, not only that section 11e of the Chandler Act codified Congressional concurrence that the limitation provisions of the Bankruptcy Act exclusively governed suits to set aside voidable preferences, but that Congress thereby "provided a period of two years subsequent to the date of adjudication to govern them" (Resp. Br., p. 13).

It is unnecessary to expand on the obvious fallacy in the contention, novel to say the least, that Congress, despite the fact that it has repealed the pertinent portions of section 11d (Section 4 of the Chander Act, June 22, 1938, c. 575 52 Stat. 840, 940) and even though it has enacted a new section 11e in entirely different language, is nevertheless to be regarded as having thereby indicated a purpose to codify prior decisions under the repealed portions of section 11d. It is sufficient to note that none of this argument can be extended to justify or in any way support the nullification of the specific language added by Congress in the alternate clause of section 11e: "or within such further period of time as the * * * state law may permit." 'Further" is obviously here used in the sense of "additional". It is therefore manifest that the limitation provision contained in section 11e allows to the trustee for the commencement of suits

to avoid preferences the period of two years or the period permitted by the state law, whichever is longer. Nothing in the prior statutes or in the decisions under them bears on the question; much less does it afford any ground for nullifying this limitation provision of the Bankruptcy Act itself.

2. No reason has been suggested for providing a period of limitation for suits by the trustee on causes of action created by the Bankruptcy Act shorter than that applying to suits by him on other causes of action.—By paraphrase of the language of *Bailey* v. *Glover*, 21 Wall. 342, dealing with the Bankruptcy Act of 1867, respondent argues that the Congress has prescribed that no suit on causes of action created by the Bankruptcy Act shall be commenced after two years subsequent to the adjudication in bankruptcy.

The Bankruptcy Acts of 1841 and 1867 contained limitation provisions different from each other and neither contained language comparable to that here involved.[1] Aside from the violence to the plain language of section 11c which it involves, respondent's contention advances no justifica-

[1] The Bankruptcy Act, August 19, 1841, sec. 8, c. 9, 5 Stat. 440, 446 provided:

> "and no suit at law or in equity shall, in any case, be maintainable by or against such assignee or by or against any person claiming an adverse interest touching the property and rights of property aforesaid, in any court whatsoever unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued."

The Bankruptcy Act of March 2, 1867, sec. 2, c. 176, 14 Stat. 517, 518, provided (R. S. sec. 5057):

> "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed."

tion for so differentiating between causes of action created by the Act and causes of action arising under state law. It is established that equality of participation among creditors is one of the primary objectives of bankruptcy administration and avoidance of preferences is one of the most important means of achieving that end. It would indeed be anomalous for Congress to bar suits on causes of action created by the Act and by Congress deemed essential to its operation while at the same time permitting to the trustee a longer period of limitation on causes of action arising under state law. If, for example, the trustee may, at any time within three years after discovery, sue to set aside a transfer in fraud of creditors under state law (cf. *First Presbyterian Church* v. *Rabbitt*, 118 F. 2d 732, 735), there is no reason to enforce a shorter period with respect to suits to avoid preferences.

Since the provisions of section 11e are in no way analogous to the limitation provisions of the earlier Bankruptcy Acts or to section 11d before amendment by the Chandler Act, decisions under them have no pertinence.

3. No Illinois decision affects the result in this case—Respondent invokes the presumption that the judges of the Circuit Court of Appeals are conversant with state law equally with the judges of this Court (Resp. Br., p. 8). It is plain, however, that the decision in the instant case went off on no interpretation of state law.

The case of *Handtoffski* v. *Chicago Union Traction Co.*, 274 Ill. 282, 286, is cited as *holding* that section 15 of the Illinois Limitations Act does not apply when a different limitation is prescribed by a federal statute (Resp. Br., p. 8). Reference is apparently intended to be made to the *obiter* statement in that decision to the effect that section 14 of the Illinois Limitations Act would be construed to fix a limitation for all personal injury actions at two years "unless a different limitation is fixed * * * under particular

statutes giving damages for personal injuries to certain classes of individuals, such as the Employers' Liability Act."

Obviously, the state court's reference is to the fact that the limitation fixed in the Federal Employers' Liability Act is an integral part of the substantive right, setting a limit to the obligation which the Act creates, and under well-established principles cannot be controverted or modified by a state statute of limitation. *Central Vermont Ry.* v. *White*, 238 U. S. 507, 511; *Atlantic Coast Line R. R.* v. *Burnette*, 239 U. S. 199, 201; *William Danzer Co.* v. *Gulf R. R.*, 268 U. S. 633, 637; *Engel* v. *Davenport*, 271 U. S. 33, 38.

Here section 11e of the Bankruptcy Act as added by the Chandler Act, so far from setting up a *different* limitation period, adopts the time fixed in the state law as the applicable period. It results that the *dicta* of the state court has no bearing on, and cannot control, the effect of the federal statute here involved.

CONCLUSION

Upon analysis, the argument of respondent appears as barren of support in authority or logic as is the opinion of the court below.

Respectfully submitted,

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